

No. 15,090

United States Court of Appeals
For the Ninth Circuit

SAMUEL J. CHASE and JEANNETTE S. CHASE,
Appellants,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Appellee.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a decision of The Tax Court of the United States which is reported at 25 T. C. No. 50 and set forth herein. (R. 41.) Samuel J. Chase and Jeannette S. Chase, husband and wife, reside at 5965 Keith Avenue, Oakland 18, California. They filed separate returns for the calendar year 1952 with the Collector of Internal Revenue, San Francisco, California. The Commissioner of Internal Revenue determined deficiencies in the income taxes of Samuel J. Chase and Jeannette S. Chase for the calendar year 1952 in the respective amounts of \$2,155.78 and \$2,014.40, and mailed notices of deficiency on November 29, 1954. Each appellant petitioned The Tax Court

of the United States for a redetermination of the claimed deficiencies. The petitions of Samuel J. Chase and Jeannette S. Chase were filed on February 1, 1955, and February 7, 1955, respectively, pursuant to the provisions of Section 6213 (a) I. R. C. 1954. The petition of Samuel J. Chase is set forth in the record herein (R. 7), but the substantially identical petition of Jeannette S. Chase is not printed pursuant to stipulation.

The Tax Court's opinion was filed on December 6, 1955, and decisions were entered on January 3, 1956, determining deficiencies against Samuel J. Chase and Jeannette S. Chase in the respective amounts of \$2,155.78 and \$2,014.40. On March 6, 1956, under Sections 7482(a) and 7482(b) (1) I. R. C. 1954, appeal was taken to this Court to review the judgment of The Tax Court (R. 55). This appeal and transcript of record were filed in this Court on April 3, 1956 (R. 61).

STATEMENT OF THE CASE.

(a) Nature of the Case.

The case involves the income tax liability of appellants for the year 1952. The only issue for decision is whether appellants are entitled to have the sum of \$22,500.00 received by Samuel J. Chase for extraordinary services rendered, taxed under Section 107(a) of the 1939 Code.

Samuel J. Chase was one of the executors of the estate of George L. Leiter, deceased. He rendered

extraordinary services in connection with the case of *Chase v. Leiter*—litigation involving the construction of a will and the right to possess substantial assets. On February 14, 1952, the Alameda County Superior Court determined that the reasonable value of his “*Chase v. Leiter*” services was \$22,500.00 and Samuel J. Chase was paid that amount in 1952. That was 100% of the compensation received for said services. The services covered a period of more than 36 calendar months and appellants claimed the right to spread the income ratably over the service period.

On November 12, 1953, said Court determined that the reasonable value of extraordinary services rendered by Samuel J. Chase in connection with matters unrelated to “*Chase v. Leiter*” i.e. matters relating to state inheritance taxes, federal and state income taxes, federal estate matters, and petition for partial distribution was \$20,000.00. That fee is hereinafter referred to as the “income tax” fee. The Commissioner claims the two fees should be combined and that appellants are not entitled to the benefit of Section 107(a) because the *Chase v. Leiter* fee of \$22,500.00 is less than 80% of total fees which Samuel J. Chase received from said estate.

The issue then is—shall the 1952 “*Chase v. Leiter*” fee be ‘brought into a hotch-potch’ with the 1953 “income tax” fee or are there justifiable bases for determining the severability of the “*Chase v. Leiter*” services.

The Tax Court found justifiable bases for determining that the attorney’s

“ . . . services in connection with this litigation (were) divisible from his other services rendered as attorney for the estate . . .” (R. 51.)

but denied Chase relief because

“ . . . his services in this regard were undertaken pursuant to his duties as such executor . . .” (R. 50.)

(b) Facts.

The facts are stipulated (R. 22).

Samuel J. Chase, an attorney, one of the executors of the estate of George L. Leiter, deceased, rendered extraordinary services in connection with the case of “*Chase v. Leiter*”—litigation involving the construction of a will and the right to substantial assets.

On August 29, 1951, an amended petition for compensation for extraordinary services rendered by Samuel J. Chase and his attorney, in connection with the case of *Chase v. Leiter*, was filed with the Alameda County Superior Court. See Exhibit 2-B. Said matter came on for trial on December 7, 18, 19, and 20, of 1951, and January 31, 1952. Evidence oral and documentary was submitted relating to the *Chase v. Leiter* services rendered and the reasonable value thereof, and on February 14, 1952, the Court determined that the reasonable value of the extraordinary *Chase v. Leiter* services rendered by Samuel J. Chase was \$22,500.00 (R. 34).

The *Chase v. Leiter* services rendered by Samuel J. Chase were personal services, covered a period of more than 36 calendar months, were separate and dis-

inct from all other services rendered, and appellants reported said compensation under Section 107(a) of the 1939 Code (R. 17).

After the Appellate Court had rendered its opinion in the case of *Chase v. Leiter*, then and only then, the Internal Revenue Department initiated an audit of the income tax returns of George and Ida Leiter, covering the period from 1941 to 1946. The Government claimed that George and Ida Leiter had not fully reported their income for said period, and on or about September 6, 1950, the Internal Revenue Agent advised Samuel J. Chase and his attorney that he proposed additional taxes which, with interest, would have amounted to \$210,202.56. The matter was settled by payment of tax in the amount of \$46,410.14. Thereafter, claim for refund of federal estate taxes paid was filed, and on or about August 19, 1952, a refund in the amount of \$45,549.04 was received.

On June 29, 1953, a petition for allowance for extraordinary services performed by Samuel J. Chase primarily in connection with the income tax services rendered by him and his attorney, was filed with the Alameda County Superior Court. On November 6, 1953, the matter was tried, witnesses were sworn and examined, and on November 12, 1953, said Court determined that the reasonable value of the extraordinary "income tax" services rendered by Samuel J. Chase was \$20,000.00 (R. 39).

The Tax Court held that the attorney's "*Chase v. Leiter*" services were divisible:

“... his services in connection with this litigation (were) divisible from his other services rendered as attorney for the estate ...” (R. 51),

but that the executor’s services were not:

“Although the situation faced by Chase in his efforts to take into his possession as executor all of the estate of the decedent presented unusual difficulties, his services in this regard were undertaken pursuant to his duties as such executor, and were properly paid for by the estate by an allowance to ‘be made as the court may deem just and reasonable for ... extraordinary services, such as ... , litigation in regard to the property of the estate ... ,’ in addition to regular percentage commissions provided by statute. All of his services compensated by the estate were services rendered by him as executor. In our opinion, no part of these services can be treated separately with regard to the application of Section 107(a)” (R. 50.)

(c) **Issues Involved.**

The sole issue here is the severability of the “*Chase v. Leiter*” services from the “income tax” services.

STATUTE INVOLVED.

Internal Revenue Code (1939)

“Sec. 107. (a) Personal Services. If at least 80 per centum of the total compensation for personal services covering a period of thirty-six calendar months or more (from the beginning to the completion of such services) is received or accrued in one taxable year by an individual or a

partnership, the tax attributable to any part thereof which is included in the gross income of any individual shall not be greater than the aggregate of the taxes attributable to such part had it been included in the gross income of such individual ratably over that part of the period which precedes the date of such receipt of accrual.”

SPECIFICATION OF ERRORS RELIED UPON.

The specification of errors relied upon is set forth in the petition for review as follows:

(1) The failure to allow said petitioners the benefits of Section 107(a) I. R. C. 1939, with respect to the separately ordered compensation for extraordinary services rendered in connection with the case of *Chase v. Leiter*.

(2) The finding of deficiencies for the year 1952 in lieu of a determination that there is no income tax due from the petitioners for said year.

SUMMARY OF ARGUMENT.

The lump sum compensation which Chase received in 1952 for more than five years' "*Chase v. Leiter*" service may be spread over the service period if the "*Chase v. Leiter*" services are separate and distinct from the "income tax" services. In the instant case, the Tax Court recognized that the "*Chase v. Leiter*" services were divisible as to Irving and there is abundant authority to support the same conclusion as to Chase.

ARGUMENT.

Section 107(a) was enacted to relieve hardship.

In *Terrell v. Commissioner*, 14 T.C. 572, the Court held that a corporation manager's patent litigation services were severable from his duties as manager, saying:

"Congress added section 107 to the Code by the Revenue Act of 1939, section 220. The Senate Committee on Finance, which was responsible for the new provision, said:

It has been considered a hardship to tax fully the compensation of writers, inventors, and others who work for long periods of time without pay and then receive their full compensation upon the completion of their undertaking. Under existing law, such persons have their income for the whole period aggregated into the final year. This results in two inequities: First, only the deductions, expenses, and credits of the final year are chargeable against the compensation for the full period; second, under our graduation surtax, the taxpayer is subjected to a considerably greater burden because of the aggregation of his compensation.

The present case comes precisely within the intent of Congress as expressed in section 107(a) and in the above explanation of its purpose. Here the petitioner undertook a special task, separate and distinct from all others, and especially from his regular duties as president and general manager of the corporation. It required much of his spare time over a long period. The compensation was entirely separate and distinct from his regular salary for regular services as an officer of the corporation. The very hardship which Congress

had in mind will result if the relief intended by section 107 (a) is not afforded him. Cf. *John Belle Keeble, Jr.*, 2 T.C. 1249.

The record shows that the personal services were sufficiently distinct and separate from the petitioner's duties and services as an officer of the corporation to regard them separately for the purpose of section 107(a). . . ."

Circumstances which have supported divisibility of services elsewhere support divisibility of "*Chase v. Leiter*" services from "income tax" services.

Time was a factor considered by the Court in determining severability in the *Terrell* case, *supra*. In the instant case, Samuel J. Chase, devoted approximately 1100 hours to the "*Chase v. Leiter*" matter. See Exhibit 2-B, page 37.

Wherever litigation has been involved, the services incident thereto have been held to be separate services.

See

Heath v. Early, 77 F. Supp. 474;

Love v. U. W., 85 F. Supp. 62;

Estate of Marion B. Pierce, 24 T.C. No. 14;

Terrell v. Commissioner, 14 T.C. 572.

The "*Chase v. Leiter*" services involved extended and bitterly contested litigation.

Severability has been predicated, in part, at least, on the fact that the Court's awards were based on separate and completed services rendered in connection with different matters. In *Estate of Marion B. Pierce*, *supra*, the Court said,

“... the court based its awards of compensation to Pierce, and others, in 1945, and in 1951, upon separate and completed services which were rendered in connection with two different plans for reorganization. Therefore, in the case of Pierce, the awards to him in 1945 and 1946 for his services in connection with the 1944 plan should not ‘be brought into a hotchpot’ with the award of the court to him in 1951 for his services in connection with the 1949 plan, and the prescribed percentage in 107(a), as amended, computed accordingly ...”

In the instant case, the Court’s order of February 14, 1952, approving compensation for “*Chase v. Leiter*” services, see Exhibit 7-G, and the Court’s order of November 12, 1953, approving compensation for “income tax” services, see Exhibit 14-N, should not be brought into a “hotchpot”. Incidentally, the “income tax” petition for extraordinary compensation, see Exhibit 12-L, would not have justified the payment of any amount for “*Chase v. Leiter*” services and vice versa.

With respect to Irving, the Tax Court recognized that the “*Chase v. Leiter*” services were severable, but it denied Chase the benefit of Section 107 (a) because, (1) he is executor, (2) he did his duty, (3) he was paid for his extraordinary services from estate funds pursuant to Court order. But executors are not denied the benefit of the statute, nor is one who does his duty, and the fact that Chase was paid for his extraordinary “*Chase v. Leiter*” services out of estate funds pursuant to Court order after an extended hearing to determine the reasonable value of the services

which he had performed is a reason for extending rather than denying the benefits of the statute.

The Tax Court's opinion with respect to Chase mentions none of the several cases which would support a holding that the "*Chase v. Leiter*" services are severable, but cases involving admittedly nonseverable services are cited to justify denial of the benefits of the statute. The cases cited are:

Alfred J. Loew, 17 T.C. 1347;

Rosalynne A. Lesser, 17 T.C. 1479;

Norcross v. United States, 114 F. Supp. 51 (R. 50).

In the *Norcross* case there was nothing in the record to permit the segregation of any part of the estate services rendered by the attorneys.

In the *Lesser* case the Court said,

"... We can not find that petitioner undertook a special task which is separate and distinct from all others he performed as a co-executor. ..."

"We have carefully considered the evidence and in particular the 'Third and final account and report of co-executors: Petition for executor's extraordinary commissions and petition for distribution', and nowhere do we have what could logically be denominated as a separate and special service. ..."

In the *Estate of Marion B. Pierce*, the Court said the Loew services were not divisible and separate, the Court saying:

"This case is distinguishable on its facts from *Civiletti v. Commissioner*, 152 F. 2d 332; *George*

J. Hoffman, Jr., 11 T. C. 1057; Alfred J. Loew, 17 T. C. 1347, affirmed per curiam 201 F. 2d 368; Ralph E. Lum, 12 T. C. 375; and Julia J. Nast, 7 T. C. 432. This case also is distinguishable from *Smart v. Commissioner*, *supra*, on the facts . . .”

“In Alfred J. Loew, *supra*, it was found that Loew’s services were continuous; that they were not divisible and separable. We pointed out that ‘the period of service is not to be broken up by the simple expedient of filing a petition for fees’, . . .”

“ . . . He (Pierce) could not resort to the filing of a petition for allowance of compensation as a device to break up ‘services of a homogeneous nature and covering a continuous period’ into segments, or units, or to mark the end of services. . . .”

Nor could Chase.

CONCLUSION.

We respectfully submit that the present case comes precisely within the intent of Congress as expressed in Section 107 (a) and in the above explanation of its purpose. Here, Chase undertook a special task, separate and distinct from all others, and especially from his regular duties as executor. It required much of his time—at least, 1100 hours—over a period of approximately five years. The Court fixed compensation for the extraordinary services rendered, was separate and distinct from his statutory commission as executor, and from the Court-fixed compensation for extraordinary services rendered in the income tax mat-

ter. Of necessity, in this type of action the executor must expend services over a long period of time and can only be compensated to the extent determined by the Court and after the period has expired. There is no way whatever for him to program in advance his compensation equitably over the years. The very hardship which Congress had in mind will result if the relief intended by Section 107 (a) is not afforded Chase.

Dated, Oakland, California,
June 11, 1956.

Respectfully submitted,
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Attorney for Appellants.

